

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7316

To be argued by
STANLEY E. KOOPER

In The
United States Court of Appeals
For The Second Circuit

JOSEPH BOSSOM,

Plaintiff-Appellant,

vs.

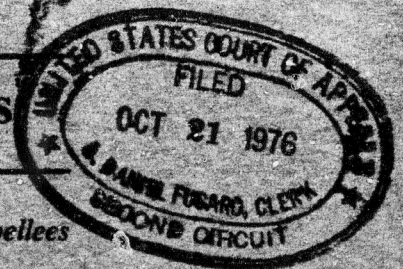
NAOMI BOSSOM and STANLEY E. KOOPER,

Defendants-Appellees.

*On Appeal from an Order from the United States District Court
for the Eastern District of New York.*

BRIEF FOR DEFENDANTS-APPELLEES

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- Solomon v. Solomon, 516 F 2d 1018 U.S. Ct. of Appeals (3rd Cir. 1975)
- Southard v. Southard, 305 F 2d 730 (2nd Cir. 1962)

STATEMENT OF FACTS

This is an appeal from a judgment entered June 2, 1976 granting defendant's cross motion to dismiss plaintiff's complaint.

Naomi Bossom and Joseph Bossom were divorced by decree of the Supreme Court of New York on July 1, 1974. The Judgment of Divorce incorporated a stipulation entered into by the parties which provided for support of the children, visitation and distribution of the property of the parties. The stipulation also contained a provision providing that Stanley E. Kooper, Esq., would hold in escrow a deed executed by the plaintiff to the defendant, Naomi Bossom.

In May of 1975 plaintiff moved to resettle the Judgment of Divorce in Supreme Court, New York County, to have the stipulation signed by the parties merge with the divorce decree and at the same time moved for a downward modification of the support provisions. Plaintiff's application to resettle the judgment was denied and the application for downward modification was set down for a hearing. Plaintiff later abandoned the application for downward modification and on plaintiff's default in appearing the matter was dismissed.

While these proceedings were pending in the State Court plaintiff commenced this action in the Eastern District to declare the stipulation existing between the parties null and void on the grounds that it violates the public policy of the State of New York.

Plaintiff in the Court below moved for summary judgment; defendant cross moved to dismiss the complaint.

Judge Constantino granted defendant's cross motion on June 1, 1976.

APPLICABLE LAW

In an action based on diversity jurisdiction involving or impinging upon the matrimonial jurisdiction of the State Courts the Federal Court should refrain from exercising jurisdiction. Kamhi v. Cohen, 512 F 2d 1051 (2nd Cir. Court of Appeals 1975).

SUMMARY OF ARGUMENT

- I. An action to declare null and void a stipulation settling a matrimonial action on the grounds that it violates the public policy of the State of New York because the child support provisions and visitation provisions are dependent and because the deed to the marital residence can be filed in favor of the defendant-mother in the event the plaintiff-father defaults in child support is a matrimonial action and therefore this action falls within the rule that Federal diversity jurisdiction does not extend to matrimonial actions.
- II. The public policy of the State of New York should be determined by the Courts of the State of New York.
 - A. The Federal Courts should not sanction any attempt to use the Federal Courts to undermine or displace the State Courts.
 - B. The legality of the provisions which plaintiff claims to be penalties fall within the equitable domestic relations jurisdiction of the State Courts.

POINT I

An action to declare null and void a stipulation settling a matrimonial action which has been incorporated in a New York State Judgment of Divorce is a matrimonial action and falls within the rule that diversity jurisdiction does not extend to matrimonial actions.

The Federal Courts have consistently refused to assume jurisdiction in actions for divorce. Barber v. Barber, 62 US (How 21) 582, 16 L. Ed. 226 (1859); Simms v. Simms, 175 U.S. 162, 20 S. Ct. 58, 44 L. Ed. 115 (1899); DeLaRama v. DeLaRama, 201 US 303, 26 S. Ct. 485, 50 L. Ed. 765, 1906.

In Barber v. Barber, supra, the Court stated at page 584:

"We disclaim altogether any jurisdiction in the Courts of the United States upon the subject of divorce or for the allowance of alimony either as an original proceeding in chancery or as incident to divorce a vinculo or to one from bed and board."

In this action plaintiff agreed by stipulation to alimony and the concurrent provisions which were approved by the Court and included in its Judgment of Divorce. Plaintiff now seeks a declaration that the stipulation is null and void not on grounds that it violates any law of the United States or is in any way unconstitutional but solely on the ground that it violates the public policy of the State of New York. By indirection plaintiff seeks to have a Federal Court void a State Court Judgment of Divorce.

The Courts have not restricted the domestic relations exception to actions for divorce but have ~~extended~~ it to also include an action to have a property settlement agreement entered into before divorce declared null and void on grounds of fraud and duress; Linscott v. Linscott, 98 F Supp 802 (S.D. Iowa, 1951); to actions concerning custody and visitation rights; Hernstadt v. Hernstadt, 373 F 2d 316 (2d Cir. 1967); also Southard v. Southard, 305 F 2d 730 2d Circ. 1962.

In the case of Phillips Nizer Benjamin Krim and Ballon v. Rosensteil, 490 F 2d 509 (1973)(U.S. Ct. of Appeals 2d Circuit), Justice Friendly wrote regarding the issue of jurisdiction:

"More than a century has elapsed since the Barber dictum without any intimation of Congressional dissatisfaction. It is beyond the realm of reasonable belief that, in these days of congested dockets Congress would wish the Federal Courts to seek to regain territory even if the cession of 1859 was unjustified. Whatever Article III may or may not permit we thus accept the Barber dictum as a correct interpretation of the Congressional grant."

Among other reasons for declining jurisdiction in Rosensteil, supra, the Court stated:

"Most important of all decision requires exploration of a difficult field of New York law with which, because of its proximity to the exception for matrimonial actions Federal judges are more than ordinarily unfamiliar. Moreover the claim for services on appeal on the award of alimony and counsel fees necessitates the interpretation of a decree of a New York Supreme Court Justice who sits only a few hundred yards from the Federal Courthouse in New York City."

Similarly, in this case plaintiff asks the Federal Court to delve into the difficult area of enforcement of matrimonial decrees and the issue of security for enforcement of those decrees. The Court is also asked not just to interpret but to review and render void the Judgment of Divorce rendered by a State Supreme Court Justice sitting only a few hundred yards from the Federal Courthouse.

The Court in Rosensteil, supra, aptly stated:

"Despite the expansive language used thirty years ago in Meredith v. Winterhaven, 320 US 228, 236-238, 64 S. Ct. 7, 88 L. Ed. 9 (1943) we do not believe that the Supreme Court today would demand that Federal judges waste their time exploring a thicket of State decisional law in a case such as this...As the two cases suggest [Magaziner v. Montemuro, 468 F 2d 782 787 (3rd Cir. 1972); Reichman v. Pittsburgh National Bank, 465 F 2d 16, 18 3rd Cir. 1972)] there is particularly strong reason for abstention in cases which though not within the exceptions for matters of probate and administration or matrimony and custody actions are on the verge, since like those within the exception, they raise issues in which the States have an especially strong interest and a well-developed competence for dealing with them."

In a case based on a separation agreement in the Third Circuit, Solomon v. Solomon, 516 F 2d 1018 U.S. Ct. of Appeals 3rd Circuit 1975) the Court after reviewing the Supreme Court decisions, stated:

"The impact of the Supreme Court's language in these cases is that the Federal Courts do not have jurisdiction in domestic relations suits except where necessary to the effectuation of prior State Court judgments involving the same matters or where jurisdiction lies by dint of the participation and review of territorial courts."

The plaintiff in this action does not seek to effectuate a prior State Court judgment; rather he seeks by indirection to undermine and defeat a New York State Judgment of Divorce. This is not a simple action to enforce a contract but an action to declare void the agreement of the parties concerning child support visitation and security therefor, which was incorporated in a New York divorce decree. The ground for vacating the stipulation and by indirection the Judgment of Divorce is that the stipulation violates the domestic relations policies of the State of New York.

Only recently in the case of Kamhi v. Cohen, supra, the Court reiterated:

"The policy of our Court will remain the case being otherwise equal in equity to keep our Federal hands off actions that verge on the matrimonial or impinge upon the matrimonial jurisdiction of the State Courts."

This is a matrimonial action and the District Court was correct, therefore, in dismissing the action.

POINT II

The public policy of the State of New York should be determined by the State of New York.

- A. The Federal Courts should not sanction any attempt to use the Federal Courts to undermine or displace the State Courts.

Prior to commencing this action in Federal Court plaintiff commenced a proceeding in the matrimonial part of the State Supreme Court. In the New York State proceeding plaintiff requested that the stipulation, which is being challenged here, be merged with the Judgment of Divorce and that the support provisions of the Judgment of Divorce be modified downward.

The plaintiff in the New York Court did not appeal the Judgment of Divorce when entered. Plaintiff's motion in the State Court was denied; however his application for modification was set down for a hearing. Plaintiff defaulted in the State Court and the application was dismissed. Plaintiff, in addition to the proceedings he has already commenced and abandoned in the State Court, has the ability to bring this very same action in the State Court which sits just across the river from this Court. The issue in this action is the public policy of the State of New York with regard to visitation and enforcement of child support obligations, and that issue should properly be raised in the State Courts.

The conclusion to be drawn from the facts in this case appear inescapable that plaintiff is attempting to use one Court system against the other. To permit the plaintiff-husband to proceed in this Court in actions of this nature would be disastrous for the defendant-wife who lives on limited means, having the custody and responsibility of three children.

In Solomon v. Solomon, supra, the 3rd Circuit Court of Appeals in denying jurisdiction noted among other considerations the possibility of "feuding couples" using one Court system against the other.

The Federal Courts should not sanction any attempt to use the Federal Court system to undermine or displace the State Court system, especially where the issue is the support and maintenance of children.

B. The legality of the provisions which plaintiff claims to be void fall within the equitable domestic relations jurisdiction of the State Court and can be determined only by an analysis of the particular facts of this case.

This is not an action to enforce a contract or even an action to declare a contract void on contract grounds of fraud or duress. This is an action to void a matrimonial stipulation incorporated in a New York Judgment of Divorce on the grounds the provisions relating to child support, visitation and the marital residence are contrary to the public policy of the State of New York. Clearly at issue is an analysis of the field of domestic relations in the State of New York. The abstention doctrine applies to actions which "impinge" or "verge" on the matrimonial.

Plaintiff in his brief, at page 8, states the motion which was pending in the State Court for downward modification had no relationship whatsoever with the present action. However, plaintiff fails to note that the application for downward modification was only one part of the motion commenced by the plaintiff in Supreme Court of New York. Initially, plaintiff attempted to eliminate the obligations created by the stipulation by requesting the Court to direct that the stipulation merge with the Judgment of Divorce. Plaintiff might at the same time in the same motion have raised the issues of the validity of the agreement but rather chose to split his causes of action and to commence another action in this Court. It is interesting that plaintiff inexplicably

defaulted in the State Court and allowed the matter to be dismissed.

Further, this is now pure contract action at law. The cases cited by plaintiff where jurisdiction was assumed involved actions at law for breach of contract. The case before the Court, however, is an equitable action to void the stipulation between the parties on the grounds it violates the domestic relations policy of the State of New York. The issues of visitation and enforcement of child support payments are not simple issues of whether or not the plaintiff paid a certain sum of money on a given day, but rather concern the State Court's discretion in approving certain arrangements to enforce child support payments under the facts of the case. The New York Courts in the enforcement of support obligations have extraordinary power which is exercised in the Court's discretion and upon an analysis of the facts of the case. In determining the validity of the provisions challenged an analysis of the facts of this case would be required and, therefore, is not subject to a motion for summary judgment.

The issues are not as clear-cut as plaintiff alleges. In that regard it is noteworthy that plaintiff's brief cites only one matrimonial case: the case of Kroll v. Kroll, 4 Misc 2d 520, 158 NYS 2d 930 (Sup. Ct. 1956), a lower Court case which does not deal with the facts existing in this action. All the other citations given by plaintiff are commercial cases which clearly do not reflect the public policy of the State of New York

regarding visitation and enforcement of child support obligations. Plaintiff has presented no clear-cut authoritative decision controlling on the facts of this case. A motion for summary judgment would be improper.

The legality of the provisions which plaintiff claims to be void falls within the equitable domestic relations jurisdiction of the State Court and can be determined only by an analysis of the particular facts of this case.

CONCLUSION

THE COURT BELOW WAS CORRECT IN DISMISSING THIS ACTION. THE ORDER OF THE COURT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

STANLEY E. KOOPER
Attorney for Defendant-Appellees
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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOSEPH BOSSOM,

Plaintiff-Appellant,
- against -

NAOMI BOSSOM and STANLEY E. KOOPER,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, **James A. Steele** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 20th day of October 19 76 at 299 Broadway New York, N.Y.

deponent served the annexed brief

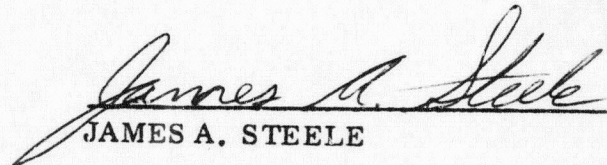
upon

Gelbwaks & Pollack

the attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein.

Sworn to before me, this 20th
day of October 1976

Beth A. Hirsh
BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978


JAMES A. STEELE